

NOTICE

Decision filed 06/26/13. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2013 IL App (5th) 120460-U

NO. 5-12-0460

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

BRAD DAVIS, d/b/a Dix Drive Thru,

Plaintiff-Appellant,

v.

THE VILLAGE OF DIX,

Defendant-Appellee.

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Appeal from the
Circuit Court of
Jefferson County.

No. 12-MR-71

Honorable
Mark R. Stanley,
Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Chapman and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in dismissing the plaintiff's complaint for a declaratory judgment and writ of *mandamus* declaring that the Liquor Control Act mandates the creation and issuance of a liquor license in the Village of Dix.

¶ 2 The plaintiff, Brad Davis, d/b/a Dix Drive Thru, appeals from the dismissal pursuant to section 2-619 of the Illinois Code of Civil Procedure (the Code) (735 ILCS 5/2-619 (West 2012)), by the circuit court of Jefferson County, of his two-count complaint against the defendant, the Village of Dix, seeking relief in declaratory judgment and *mandamus*. For reasons which follow, we affirm.

¶ 3 The complaint, filed May 23, 2012, alleges that in 1976 the plaintiff attended a meeting of the Village of Dix Board of Trustees (Board of Trustees) and verbally asked for a license to sell package liquor for "off-premises consumption" out of his business, which he described as a "Bar and Grill." The plaintiff was informed by the Board of Trustees that

the Village of Dix was "dry" and that no liquor license would be issued.

¶ 4 Thereafter, on January 26, 1977, pursuant to section 9-10 of the Liquor Control Act of 1934 (the Liquor Control Act or Act) (235 ILCS 5/9-10 (West 2006)), the plaintiff filed a petition for an election to determine if the prohibition on the sale of liquor for off-premises consumption in the Village of Dix should be continued. The result of the election was 130 to 56 in favor of continuing the prohibition of the sale of liquor for off-premises consumption in the Village of Dix.

¶ 5 On December 14, 2010, the Village of Dix (the Village) passed Ordinance 2010-06, which prohibits the possession of alcoholic liquor within public places of accommodation. This ordinance effectively prohibits within the Village the sale of liquor for on-premises consumption.

¶ 6 On November 1, 2011, the plaintiff filed an application for a license to sell alcoholic liquor for retail within the Village for both off-premises and on-premises consumption. The Village responded by letter that the Village was "dry" and therefore had no liquor licenses to issue.

¶ 7 On November 23, 2011, the plaintiff filed with the Village a request pursuant to the Freedom of Information Act for any documentation showing that the Village had held a referendum election pursuant to section 9-2 of the Liquor Control Act (235 ILCS 5/9-2 (West 2006)) in which a majority of the voters had voted to prohibit the sale of alcoholic liquor within the Village. No response was forthcoming. The plaintiff's complaint alleges that no vote to prohibit the sale of liquor for on-premises consumption in the Village had ever been held.

¶ 8 Count I of the plaintiff's complaint seeks a declaratory judgment that, because no referendum had been held to prohibit the sale of alcoholic beverages, the Village is "wet" for the purpose of establishing the necessary requirements for, and the creation of, licenses for

the sale of liquor for "on-premises" consumption. Count II of the plaintiff's complaint seeks a writ of *mandamus* directing the Village to immediately comply with the provisions of the Liquor Control Act, to establish the necessary requirements for, and to create, licenses for the sale of alcoholic liquor for on-premises consumption within the Village, and to immediately issue the plaintiff such a license.

¶ 9 On June 28, 2012, the Village filed a motion pursuant to section 2-619 of the Code for the involuntary dismissal of both counts of the plaintiff's complaint. With respect to count I, for declaratory judgment, the defendant argued that the Liquor Control Act does not mandate and require that local governments create and issue liquor licenses either generally or for any particular classification or to a particular person; that the plaintiff has no protectable right or interest because the Village has no duty to create and issue a license to the plaintiff; that the plaintiff is seeking an advisory opinion only; and that the plaintiff has no standing because he alleges no particular injury which is not applicable to all Village residents. With respect to count II, for *mandamus*, the defendant argues that *mandamus* cannot issue to compel the Village to perform what is a legislative, discretionary, and permissive act, the creation and issuance of a liquor license, and that the plaintiff has no standing because he alleges no particular injury which is not applicable to all Village residents. The motion also argues that the plaintiff's action is barred by the fact that the plaintiff had also appealed the Village's actions to the State Liquor Control Commission, which appeal was still pending, and that the plaintiff had not exhausted his administrative remedies.

¶ 10 On September 12, 2012, the court entered a docket sheet order granting the defendant's motion to dismiss pursuant to section 2-619 as to both counts of the plaintiff's complaint. The court's order did not contain any findings, conclusions, or reasoning. Nevertheless, the parties seem to agree that the court had held that the Village had never held

an election to declare the Village "dry," but that the Liquor Control Act is permissive and not mandatory and does not require the creation or issuance of licenses to sell liquor. The court suggested that the plaintiff's remedy was to elect people to the Village Board of Trustees who would create and issue such licenses. The plaintiff appeals.

¶ 11 We review *de novo* the circuit court's decision granting the defendant's motion to dismiss under section 2-619 of the Code. *Joseph Construction Co. v. Board of Trustees of Governors State University*, 2012 IL App (3d) 110379, ¶ 17. We must construe all pleadings and supporting documents in a light most favorable to the plaintiff. 2012 IL App (3d) 110379, ¶ 17.

¶ 12 The Liquor Control Act grants to municipalities "the power by general ordinance or resolution to determine the number, kind and classification of licenses, for sale at retail of alcoholic liquor *** and the amount of the local licensee fees to be paid for the various kinds of licenses to be issued in their political subdivision." 235 ILCS 5/4-1 (West 2006). This section further provides that "the issuance of such licenses shall not be prohibited except for reasons specifically enumerated in" the Act. 235 ILCS 5/4-1 (West 2006). These reasons include such things as that the applicant for a license is not a resident of the municipality, or is not of good character, or is a convicted felon, or the location of the premises sought to be licensed is near a church or school. See 235 ILCS 5/6-2, 6-11, 6-12, 6-25 (West 2006). We note, however, that nowhere does the Act mandate that any municipality create, by ordinance or resolution, any liquor licenses at all. And where no liquor licenses have been created, there are none to be issued or denied. Such is the case at bar.

¶ 13 The Village of Dix has not, by ordinance or resolution, created any liquor licenses for which the plaintiff can apply, or which the Village can grant. The Village of Dix, through its Board of Trustees, has determined that it does not want the sale of any alcoholic beverages within the Village. Indeed, the Board of Trustees has passed an ordinance prohibiting the

possession of alcoholic beverages at any place of public accommodation within the Village.

¶ 14 The Liquor Control Act provides a comprehensive regulatory scheme for the sale of alcoholic liquor. Under the Act, the voters of a municipality can restrict the sale of alcoholic beverages within its borders by having a referendum to declare the municipality "dry." 235 ILCS 5/9-2 (West 2006). In the event of such a referendum, the municipality has no discretion to create and issue liquor licenses. In the absence of such a referendum, the Board of Trustees of the municipality retains discretion to determine by ordinance or resolution the number, kind, and classification of liquor licenses. The Board of Trustees of the Village of Dix has used this discretion to determine that it would not create or issue *any* licenses to sell alcoholic beverages within the Village. Nothing in the Act takes this discretion away from the municipality or makes the creation or issuance of liquor licenses mandatory. Our supreme court has so held.

¶ 15 In *Hall v. City of Kewanee*, 379 Ill. 176, 180 (1942), our supreme court stated: "It is to be noted that the provisions of the Liquor Control act [*sic*] are permissive only,—*i.e.*, that the city may determine certain things and make certain regulations and restrictions. There is no mandatory language requiring the city to pass any such acts except at its own discretion ***." We find no language in the Liquor Control Act to the contrary, nor does the plaintiff point to any.

¶ 16 Count II of the plaintiff's complaint sought an order of *mandamus* directing the Village to create and issue to him a license for the sale of alcoholic beverages for on-premises consumption. *Mandamus* is an extraordinary remedy used to compel a public official to perform a purely ministerial duty where no exercise of discretion is involved. *People ex rel. Alvarez v. Skyrd*, 241 Ill. 2d 34, 38 (2011). A writ of *mandamus* will be awarded only if the petitioner establishes a clear right to the relief requested, a clear duty of the public official to act, and clear authority in the public official to comply with the writ.

Skyrd, 241 Ill. 2d at 39. Because the creation of liquor licenses is a purely discretionary act on the part of the Village, *mandamus* will not lie to compel it. Accordingly, the circuit court did not err in dismissing count II of the plaintiff's complaint.

¶ 17 In *People ex rel. Silverman v. City of Chicago*, 13 Ill. App. 2d 66 (1957), the plaintiff, owner of a retail establishment, brought an action for *mandamus* to compel the city to issue to him a certain kind of liquor license not authorized by city ordinance. The plaintiff argued that the issuance of such a license was made mandatory by an amendment to the Liquor Control Act. The circuit court issued the writ and the appellate court reversed. In so doing, the appellate court stated: "It is clear that the power to determine the kind and classification of local licenses is still left entirely to the discretion of the local governing body. This discretionary power with respect to the enactment of liquor control ordinances by the local governing body has long been recognized by this State." 13 Ill. App. 2d at 69. The court emphasized that the courts of Illinois had uniformly held that an ordinance creating the liquor license must be in effect before city officials can issue a license. 13 Ill. App. 2d at 71. Where no such ordinance was in effect, the plaintiff had no right to the issuance of the license and the city officials had no duty to issue it. 13 Ill. App. 2d at 71. Accordingly, the plaintiff was not entitled to a writ of *mandamus*.

¶ 18 Similarly in the case at bar, the plaintiff seeks an order of *mandamus* directing the Village to issue to him a liquor license which has not even been created by the Village by ordinance or resolution. The creation of such a license is left to the discretion of the Village, and where no ordinance has created such a license, the plaintiff has no right, and the Village no duty, to issue it. Accordingly, *mandamus* will not lie and the circuit court did not err in dismissing count II of the plaintiff's complaint.

¶ 19 Count I of the plaintiff's complaint sought a declaratory judgment that the Village was "wet" for the purpose of establishing the necessary requirements for, and the creation of,

licenses for the sale of liquor for on-premises consumption. It is well settled that declaratory judgment should not be granted unless the court can by such judgment dispose of the controversy between the parties. *Marlow v. American Suzuki Motor Corp.*, 222 Ill. App. 3d 722, 728 (1991). Indeed, the Code of Civil Procedure prohibits a declaratory judgment if it appears that the judgment would not terminate the controversy giving rise to the proceeding. 735 ILCS 5/2-701(a) (West 2012).

¶ 20 It is clear that the declaratory judgment sought by the plaintiff would not dispose of the controversy between the parties. It would not result in the issuance to the plaintiff of a liquor license, nor would it result in the passage of an ordinance creating such a license. The Village may be "wet" in the sense that no referendum has been held to prohibit the sale of liquor for on-premises consumption, but it remains "dry" in the sense that the Village Board of Trustees has not passed an ordinance creating any liquor licenses. Accordingly, the circuit court did not err in dismissing count I of the plaintiff's complaint.

¶ 21 As the circuit court apparently pointed out, the citizens of the Village of Dix have elected to their Board of Trustees representatives who believe the Village is best served by restricting the sale of alcoholic beverages within its limits. If the citizens prefer that the sale of liquor be allowed they need only elect to their Board of Trustees representatives who share this preference.

¶ 22 For the foregoing reasons, the judgment of the circuit court of Jefferson County is hereby affirmed.

¶ 23 Affirmed.